

1144 Transcript of 04-27-07 discovery hearing.txt

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
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4 STATE OF OKLAHOMA, ex rel,)
5 W.A. DREW EDMONDSON, in his)
6 capacity as ATTORNEY GENERAL)
7 OF THE STATE OF OKLAHOMA,)
8 et al.)
9 Plaintiffs,)
10 v.)
 TYSON FOODS, INC., et al.,)
 Defendants.)

No. 05-CV-329-TCK-SAJ

TRANSCRIPT OF PROCEEDINGS
HAD ON APRIL 27, 2007
MOTION HEARING

BEFORE THE HONORABLE SAM A. JOYNER, Magistrate Judge

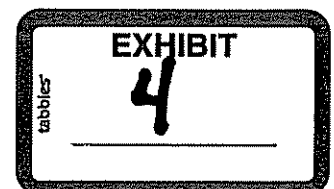
19 APPEARANCES:

20 For the Plaintiffs: Mr. Louis W. Bullock
21 Mr. David P. Page
22 Mr. M. David Riggs
23 Mr. Richard T. Garren
24 Mr. David P. Page
25 Mr. Frederick Baker
Mr. Robert A. Nance

24 For the Defendants: Mr. Robert W. George
25 Mr. John H. Tucker
Ms. Theresa Noble Hill
Mr. Robert P. Redemann

Glen R. Dorrough
UNITED STATES COURT REPORTER

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5 MR. GARREN: We do not, Your Honor.

6 THE COURT: It was not.

7 MR. GARREN: That's part of our discussion.

8 MR. GEORGE: Your Honor, could I clarify one thing for
9 the record?

10 THE COURT: Sure.

11 MR. GEORGE: Your Honor made the statement and I think
12 it's just an observation from things that have been said that
13 perhaps the parties, none of the parties in this case have
14 produced ESI and I simply want to represent, make sure the
15 record is clear on behalf of my client, the Tyson entities,
16 we've made no distinction in our production between
17 electronically stored information and paper copies to the
18 extent a discovery request sought documents. If we had it in
19 the electronic stored information we produced it. And we're,
20 of course, still in the process of producing additional
21 documents, but I don't want the Court to be left with the
22 impression that no party to this case has been producing ESI.

23 THE COURT: Okay. Good. All right, good. Well it is
24 in our order document 1125 that you're supposed to talk about
25 all of these issues although it's more clearly set forth in

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1 these Kansas guidelines. And in the order I think you have
2 reserved many of those issues for future discussion. But if
3 they are not in the order, you're going to have to talk about
4 those things. And you -- in regard to the question metadata, I
5 mean -- well, let me throw these things on the table and if you
6 have comments or think you have made some progress in that
7 area. I mean it's reasonably a big question as to the form in
8 which the production is going to be made. You have got to

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9 decide whether you are going to make it in native format, in
10 other words, the format in which it currently exists which
11 means that it includes all of the metadata -- and I'm sure
12 everybody knows what that is so we won't get into that.
13 Obviously if you have been to two cocktail parties with a bunch
14 of lawyers you've been talking about metadata. It's all of
15 that hidden stuff that you can't get away from, can't get rid
16 of. But if it's produced in native format then you will get
17 your metadata and it's searchable. If you produce it in an
18 image form which is normal a TIF or JPEG, then it's probably
19 not going to be searchable and you won't get your metadata.
20 The courts have dealt with the issue of whether or not it
21 should be produced in native form or not. Curiously most of
22 the Court's, specifically there's an opinion by Magistrate
23 Judge Waxse, W-A-X-S-E, in which he says that the normal
24 form -- he's in Kansas, in fact he's the guy that wrote the
25 guidelines for Kansas, he's saying the normal production

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1 required by the rules includes metadata, and I think that's
2 probably a correct interpretation. The Sedona Conference which
3 is an extremely influential organization which helped write
4 these rules would suggest that the inclusion of metadata should
5 be the exception and not the general rule because there's no
6 reason to include all of that information if it's really not
7 important to your lawsuit. So you're going to have to make
8 those considerations and decide what you want to do there. Of
9 course, you're going to have to become very familiar with the
10 two-tiered process of production which says that any data that
11 is not reasonably accessible need not be produced. So you've
12 got to decide whether or not it is reasonably accessible. And
13 you need a privilege order which you have, we have done that, I

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14 think, which is helpful and important and is taken care of.
15 And there is the safe harbor provision which says that --
16 basically it says that if -- basically it says that if you
17 destroy documents -- well, I was actually going to give you the
18 real information. Basically it says that if you destroy,
19 accidentally destroy documents, electronically stored
20 information without malice and without gross negligence, that
21 sanctions are not appropriate. I raise that merely to tell you
22 not to rely on it. It's called a safe harbor and it's not near
23 as safe as it sounds. The language is weird and what the Court
24 is going to really do if there's some destruction of electronic
25 data, we're going to look at it and see what's reasonable and

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1 fair and if someone has been negligent in the destruction of
2 certain data well, they are probably going to end up paying the
3 cost of reproducing that data and that's generally the
4 direction the courts have gone. So they really have not
5 followed -- the safe harbor is not as safe as it looks, so
6 that's why I'm suggesting you not rely on it. In actually the
7 Koch Oil Company case which we had here a couple years ago,
8 which was before the new rules, but I don't see any reason for
9 anything to change, they accidentally destroyed some data that
10 was relevant to that qui tam case and they ended up paying a
11 \$200,000 sanction to recreate that data. And it was accidental
12 they put it on desk and some, they said, janitor or somebody
13 came in and picked up this data and threw it away. So it was
14 not gross negligence, it was not malice, but still they had to
15 pay \$200,000 to reproduce the data. So don't rely on the safe
16 harbor, be careful with electronic stuff.

17 So with that, do we need another order at this time in

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18 regard to electronically stored information? It doesn't sound
19 like we do. I mean it sounds like you are ready to get back
20 together. Well, the Court can -- well, I don't know whether I
21 can put in an order what I have said in regard to what
22 potentially discoverable information means. Mr. Tucker?
23 MR. TUCKER: I don't think we're having any problem
24 discussing it. Mr. Garren can feel free to -- or anybody on
25 that side can feel free to say that that's not so but I think

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1 the discussions have been held on a very professional basis.

2 THE COURT: Okay.

3 MR. TUCKER: And everybody is kind of realizing
4 that -- I don't want to call it the goose and gander rule, I
5 prefer you call it the tom and hen rule.

6 THE COURT: Tom and hen.

7 MR. TUCKER: Recognizing that we don't raise any
8 geese, Your Honor.

9 THE COURT: A tom and hen is a male and a female?

10 MR. TUCKER: Those would be turkeys, Your Honor.

11 THE COURT: Turkeys.

12 MR. TUCKER: Yes, sir. So there are toms, big toms
13 and there are hens. In any event the tom and hen rule.

14 THE COURT: I understand.

15 MR. TUCKER: But the only issue that we had,
16 absolutely the only issue was our understanding of what the
17 state's artificial limitation was on the scope of it. We
18 handled all of that today. I think that the parties have
19 talked about and considered the issues that you are raising
20 today, I know particularly Cargill and the State have talked
21 about those things and so far we haven't had those problems.
22 I'm sure if we have one, one or the other of us will bring it

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23 to your attention.

24 THE COURT: I'm sure. The order, stipulated order
25 implementing this had deadlines and dates in it. It says

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1 supplemental initial disclosures by April 15th. Apparently
2 that's happened. All right, agreed to complete their
3 disclosures related to methods employed. Well, that's supposed
4 to have happened by March 15th, but that's what you're going to
5 do now is continue those discussions. All right, will also
6 require additional discussions by April 15th.

7 So when do you want to make your supplemental ESI
8 disclosures or do you think it's too early to say.

9 MR. GARREN: Your Honor, if I may, you're talking
10 about the actual production rather than disclosures. The
11 disclosures have been made. What we're talking about now is
12 actual production of ESI.

13 THE COURT: Correct.

14 MR. GARREN: And Mr. Hammons probably can speak to
15 that as it pertains to the state because there are a number of
16 agencies. We haven't specifically spoken to the defendants
17 about each agency and about what we would propose how it could
18 be addressed. I would suggest that you allow us to do that and
19 if we still have problems come back, but since we really
20 haven't discussed that specific production, let's really get
21 down to the nuts and bolts of, you know, how you are going to
22 turn it over to us. Are you going to do it after hours or are
23 you going to do it by give us a hard drive and we download it?
24 Those are the specifics that haven't been talked about.
25 Frankly right now, only the lawyers have been talking. We

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